94

(4)

FILED

MAY 28 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-931

IN THE

Supreme Court of the United States

MAGNOLIA INDUSTRIAL FABRICATORS, INC. and
ST. PAUL SURPLUS LINES,
Petitioners,

v.

DEVON LOUISIANA CORP. and
PETRA CONSULTANTS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

HAROLD K. WATSON
Counsel of Record
CHRISTOPHER DOVE
LOCKE LORD BISSELL
& LIDDELL LLP
600 Travis St., Suite 3400
Houston, TX 77002
(713) 226-1200

MARCUS R. TUCKER
ROYSTON, RAYZOR, VICKERY
& WILLIAMS, LLP
1001 McKinney, Suite 1100
Houston, TX 77002
(713) 224-8380

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PETITIONERS' REPLY TO BRIEF IN OPPOSITION	1
1. Devon Misstates the Record	1
2. Devon Misstates the Decision Below	5
3. Devon Misstates *Davis & Sons*	8
4. Devon Fails To Explain How The Second And Ninth Circuit Decisions Are Not In Conflict With The Decision Below	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES — Page

Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115 (5th Cir. 1991) 5-6

Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313 (5th Cir. 1990) ..... *passim*

Domingue v. Ocean Drilling & Exploration Co., 923 F.2d 393 (5th Cir. 1991) 7

Folksamerica Reinsurance Co. v. Clean Water of New York, Inc., 413 F.3d 307 (2d Cir. 2007) 10-11

Hoda v. Rowan Co., 419 F.3d 379 (5th Cir. 2005) 5-6

Kossick v. United Fruit Co., 365 U.S. 731 (1961) 5, 7

Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd., 543 U.S. 14 (2004) 2

Phoenix Construction Co. v. The Steamer Poughkeepsie, 162 F. 494 (S.D.N.Y. 1908), *affirmed*, 212 U.S. 558 (1908) 3-4

Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969) 3

Sentry Select Ins. Co. v. Royal Ins. Co. of America, 481 F.3d 1208 (9th Cir. 2007) ... 10-11

Vickers v. Chiles Drilling Co., 822 F.2d 535 (5th Cir. 1987) 6

TREATISES

RON BAKER, A PRIMER OF OIL WELL DRILLING (4th ed. 1979) 6-7

IN THE

Supreme Court of the United States

No. 07-931

MAGNOLIA INDUSTRIAL FABRICATORS, INC. and
ST. PAUL SURPLUS LINES,
Petitioners,

v.

DEVON LOUISIANA CORP. and
PETRA CONSULTANTS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Devon Louisiana Corporation's ("Devon's") Response misstates the record in this case, the decision below, the Fifth Circuit jurisprudence, and the decisions of the Second and Ninth Circuits that conflict with the Fifth Circuit jurisprudence. An accurate reading displays why the Court should grant certiorari.

1. Devon Misstates The Record

The issue presented for review is whether the test developed in *Davis & Sons, Inc. v. Gulf Oil Corp.*,

919 F.2d 313 (5th Cir. 1990) and applied below is compatible with this Court's decision in *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004) ("*Kirby*"), as interpreted by the Second and Ninth Circuits. Using *Davis & Sons*, the Fifth Circuit concluded that the contract at issue was maritime by focusing on a selected aspect of the contract, despite this Court's admonition in *Kirby* that the contract is to be considered as a whole. Devon selectively drafted its Statement of the Case to suggest that the decision may be correct on the merits, even if the Fifth Circuit's reasoning was erroneous. An accurate statement of the record, however, reveals how the *Davis & Sons* test led to an incorrect result.

Devon argues that the Master Service Agreement ("MSA") "contains provision for the use of vessels [and] requirements for marine insurance coverage." *Brief in Opposition* at 2. However, Devon omits that the MSA is a standard form contract[1] that Devon used with all its contractors, only some of whom would provide maritime services, and thus includes both maritime and non-maritime elements. For instance, while the MSA requires marine insurance, it also requires the contractor to carry Comprehensive Automobile Liability insurance, which would obviously have no application to marine operations. The insurance requirements in this "one-size-fits-all" form do not overcome the non-maritime elements that dominate this case.

---

[1] This is evident from the fact that the name of Petitioner Magnolia Industrial Fabricators is typed into a blank in the contract.

Devon also points out that the MSA requires compliance with Coast Guard regulations, but this requirement is contained in a paragraph that requires the contractor to "comply with all applicable local, State and Federal safety regulations. These rules and regulations include, but are not limited to, regulations of the United States Coast Guard . . . ." *Id.* at 2. This says nothing more than that some of Devon's contractors might perform work subject to Coast Guard regulations. The reference to local and state law equally indicates that other contractors might perform wholly non-maritime work.

Devon also quotes a portion of the choice of law clause in the MSA that calls for the application of maritime law, *id.* at 2, but conveniently omits the remainder, which provides that "In the event that it is ever judicially determined that the General Maritime laws of the United States are inapplicable, then this Contract shall be governed by the laws of the State of Louisiana." Again, this provision does not suggest that the parties intended for maritime law to apply if the services provided were non-maritime in nature and thus "the General Maritime laws of the United States are inapplicable."

Devon then omits facts from its description of the work done by Petitioner to make it seem more maritime than it was. Devon describes the structure that Magnolia was hired to repair as an "offshore platform located . . . in navigable waters of the United States," *id.* at 3, but omits that the platform was firmly affixed to the seabed and thus was an "island[], albeit [an] artificial one[]." *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 360 (1969). In *Rodrigue,* this Court approved language from *Phoenix Construction Co. v. The Steamer Pough-*

keepsie, 162 F. 494, 496 (S.D.N.Y. 1908), *affirmed*, 212 U.S. 558 (1908), that work related to such structures "is not even suggestive of maritime affairs." 395 U.S. 360-61.

Devon also states that a "vessel was needed to support the repair crew [and] transport the crew to the offshore location," but omits that Magnolia did not own or operate the vessel. *Brief in Opposition* at 3. Accordingly, the work anticipated was indistinguishable from hiring a Manhattan construction crew to do work on Staten Island; the fact that the Staten Island ferry was necessary to reach the job site would not make this a maritime contract.

Devon also states that the vessel that transported the Magnolia crew to the artificial island served "as a work site for fabrication work, and all the welding and cutting operations," and that the plaintiff whose claim gives rise to this contractual indemnity dispute was injured on the vessel. *Id.* at 3. But Devon omits that both parties anticipated that *all* of the work would be done on the platform itself, and that the only reason that any work was done on the vessel was the inadvertent failure to obtain a hot work permit. Even so, the fabrication work was the only task performed on the boat, and the vast majority of the work was done solely on the platform. Had weather not cut the job short, 19 of the 21 items to be accomplished would have been done on the platform. Moreover, as will be discussed, the fact of where the plaintiff worked or was injured, while an important part of the Fifth Circuit's *Davis & Sons* test, should be irrelevant under the "conceptual" approach mandated by this Court's *Kirby* decision as interpreted by the Second and Ninth Circuits.

Accordingly, application of the *Davis & Sons* test was not merely a case of taking the wrong road but getting to the right destination; it led the Fifth Circuit to a place never envisioned by *Kirby*.

2. Devon Misstates The Decision Below

Devon attempts to clothe the decision below with respectability by describing the methodology used as a simple application of the "two-step" test for determining admiralty contract jurisdiction set forth in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) and reaffirmed in *Kirby*. Under that test, because "precedent and usage are helpful insofar as they exclude or include certain common types of contract," 365 U.S. at 735, the court first looks to prior jurisprudence. In the absence of controlling precedent, the court addresses "whether the transaction relates to ships and vessels, masters and mariners, as agents of commerce." *Id.* at 736. *Kossick* makes it clear that this inquiry is "conceptual," not "spatial," *id.* at 735, and *Kirby* reaffirms this.

While the court below did review prior precedent, this hindered rather than helped because the Fifth Circuit jurisprudence was tainted by *Davis & Sons*. The court principally relied upon *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115 (5th Cir. 1991) and *Hoda v. Rowan Co.*, 419 F.3d 379 (5th Cir. 2005), both post-*Davis & Sons* decisions. Both cases involved routine oilfield operations performed on virtually every oil or gas well, whether the well is located on land or offshore. In *Campbell*, the contract called for the setting of "casing," i.e., steel pipe that is inserted in every well whether on land or offshore to

keep the walls of the well from caving in.[2] In *Hoda*, the contractor was hired to tighten bolts on the blowout preventer, a device set on top of the casing on every oil or gas well on land or offshore so that the well can be shut in if a blowout commences.[3] Casing and blowout preventers are moved into position using the drilling rig's lifting apparatus, whether the rig is located on land or over water.[4] In both cases, the well was being drilled by a "jackup" rig, an offshore drilling structure with legs that support the hull; the rig is floated onto location and then the legs are lowered to the seafloor and the hull is jacked out of the water.[5] Jackup rigs are considered vessels,[6] but in both cases the contractor did not own or operate the rig itself, but was merely called out to perform the task in question. Thus, the focus should have been on the non-maritime nature of the work to be done. However, because these routine oilfield operations required the use of a vessel's lifting apparatus, the *Campbell* and *Hoda* courts applied *Davis & Sons* and concluded the contracts were maritime in nature.

In turn, the court below noted that welding on the boat became legally necessary because a hot work permit had not been obtained, compared that situation with the use of the lifting apparatus in *Campbell* and *Hoda*, and concluded that the contract to repair

---

[2] RON BAKER, A PRIMER OF OIL WELL DRILLING 82 (4th ed. 1979) (hereinafter "BAKER").

[3] BAKER at 81.

[4] BAKER at 50-56.

[5] BAKER at 87.

[6] *See, e.g., Vickers v. Chiles Drilling Co.*, 822 F.2d 535, 537 (5th Cir. 1987).

the platform was a maritime contract. The Fifth Circuit was obliged to distinguish *Domingue v. Ocean Drilling & Exploration Co.*, 923 F.2d 393 (5th Cir. 1991). There the contractor was hired to perform a wireline operation on an offshore well. This involves inserting a tool on a wireline into the well,[7] and since the well was being drilled by a jackup rig, the operation had to be performed on the vessel. However, the court concluded that this was not a maritime contract—a conclusion in tension with *Campbell* and *Hoda*.

Campbell, *Hoda*, *Domingue*, and the decision below demonstrate that *Davis & Sons* has led the Fifth Circuit far out of the mainstream of admiralty contract jurisdiction jurisprudence, and into inconsistent waters. Following this Court's decision in *Kossick*, the courts in *Campbell*, *Hoda* and *Domingue* should have asked whether conceptually a contract to set pipe in an oil well, tighten the bolts on a blowout preventer, or run a wireline tool down a well "relates to ships and vessels, masters and mariners, as agents of commerce." Had *Campbell* and *Hoda* been correctly decided, it is inconceivable that the court could have concluded that the contract involved here would have been considered maritime in nature, because minimal work was done on a vessel, and then only because of the unanticipated failure to get a hot work permit. Accordingly, the decision below can only be considered a mainstream application of the two-step *Kossick* test if following improperly reasoned decisions is "mainstream." And, of course, the decision below can scarcely be considered to apply the second part of the *Kossick* test, because instead of

---

[7] BAKER at 94.

going to the core question of whether the contract in question involves maritime commerce, the court asked the *Davis & Sons* questions.

3. Devon Misstates *Davis & Sons*

Devon describes the *Davis & Sons* test as one that is "designed to determine the nature of the MSA and subsequent work order read together, focusing on the overall character of the contract," and argues that because *Davis & Sons* focuses on the "overall character" of the contract, it is thus compatible with *Kirby*. *Brief in Opposition* at 5. This statement is misleading, however, because it is clear that *Davis & Sons* does not focus on the "overall character" of the contract, but solely on isolated portions of the contract.

First, *Davis & Sons* makes it clear that no consideration is to be given to any job performed under the MSA other than the one giving rise to the claim in question:

> Davis asserts that [since] approximately 70% of the labor provided under this contract was land-based, the contract's principal obligation was demonstrably non-maritime. Even if we assume Davis's factual assessment to be correct, however, this does not foreclose the application of maritime law to the work orders applicable to some or all of the 30% vessel-based services as maritime obligations . . . .

919 F.2d at 316.

Moreover, the *Davis & Sons* test requires consideration of the following factors:

1. What does the specific work order in effect at the time of the injury provide?

2. What work did the crew assigned under the work order actually do?
3. Was the crew assigned to work aboard a vessel in navigable waters?
4. To what extent did the work being done relate to the mission of that vessel?
5. What was the principal work of the injured worker?
6. What work was the injured worker actually doing at the time of the injury?

Id.

These factors focus solely on the work done under the particular work order, not on the contract's "overall character." *Davis & Sons* focuses on "overall character" only if one looks at the "character" of the particular work order—and not even then, because the last two factors chop the work order into segments. *Davis & Sons* focuses on the work of the individual worker, who, as in this case, might have been involved in only a small fraction of the work done under that work order. Accordingly, *Davis & Sons* cannot be said to focus the inquiry on the "overall character" of the contract, even if one views the contract as the individual work order rather than the MSA. This segmented approach is irreconcilable with this Court's decision in *Kirby* as interpreted by the Second and Ninth Circuit, which requires a determination of whether the contract, in its totality, is related to maritime commerce.

4. Devon Fails To Explain How The Second And Ninth Circuit Decisions Are Not In Conflict With The Decision Below.

The primary question is whether the decision below applying the *Davis & Sons* test to determine admiralty contract jurisdiction can be reconciled with the decisions of the Second and Ninth Circuits applying *Kirby*. Interestingly, Devon's discussion of this critical issue occupies fewer than two pages of its brief.

Both *Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.*, 413 F.3d 307 (2d Cir. 2007) and *Sentry Select Ins. Co. v. Royal Ins. Co. of America*, 481 F.3d 1208 (9th Cir. 2007) presented the question of whether an insurance policy was a maritime contract. Both policies insured both marine and non-marine risks. By its nature, an insurance policy provides coverage over a period of time, and discrete claims will be made under the policy. In *Folksamerica*, the claim involved an injury to a worker on a barge, but involved the Comprehensive General Liability section of the policy, a non-marine insurance form. Nonetheless, the court concluded that the insurance policy as a whole was maritime in nature. In *Sentry Select*, the claim involved injury to a Jones Act seaman and involved the Maritime Employers' Liability endorsement to the policy, a marine insurance form, but the court found that the non-marine elements predominated, and that the policy was thus not maritime.

In both cases the courts could have analyzed the question in terms of whether the particular claim was maritime in nature, considering the section of the policy involved and the facts of the particular incident. Alternatively, the courts could have analyzed whether the particular section of the policy

involved in the claim was a maritime contract, without regard to the facts of the claim. Instead, *Kirby* compelled both courts to look to whether "the primary objective" of the policy as a whole was maritime commerce. Both decisions left no doubt that the result would have been the same without regard to what section of the policy was involved, and without regard to the facts giving rise to the claim.

The MSA, like the insurance policies involved in *Folksamerica* and *Sentry Select*, applies to both maritime and non-maritime work. Like an insurance policy, the MSA applies over a period of time. And like an insurance policy, each claim under the indemnity provision would involve facts unique to that claim. Contrary to the Second and Ninth Circuits, however, the Fifth Circuit apparently did not feel constrained to apply the reasoning of *Kirby* to resolve the question of whether the contract claim was governed by maritime law. Unlike the Second and Ninth Circuits, the Fifth Circuit analyzed the jurisdictional question by focusing on the facts of the particular dispute, not on whether the primary objective of the MSA as a whole was maritime commerce. And unlike the Second and Ninth Circuits, the decision below leaves no doubt that the case would have been decided differently if the facts of the particular dispute had been different. For example, if the plaintiff in this case had done all his work on the platform and had been injured on the platform, it is inconceivable that the Fifth Circuit would have concluded that maritime law applied. Devon's only explanation of why the Fifth Circuit's decision is consistent with these decisions is to claim that under *Davis & Sons*, "one must read both the Master Service Agreement and the work orders together." *Brief in Opposition* at 11. Not only would the

particular work order be irrelevant under the Second and Ninth Circuit decisions, but, as we have seen, *Davis & Sons* requires inquiry into a great deal more than just the MSA and the work order, because it also requires an inquiry into the unique facts of the claim. This is irreconcilable with the Second and Ninth Circuit interpretations of *Kirby*.

CONCLUSION

As this Court stated, *Kirby* was "a maritime case about a train wreck." 543 U.S. at 390. This is a non-maritime case where the injury just happened to occur on a boat. This Court should grant certiorari to clarify whether the *Kirby* rationale is broadly applicable to all determinations of maritime contract jurisdiction, or whether the Fifth Circuit should be allowed to continue to apply its incident-specific and therefore spatially-oriented methodology to determining whether service contracts in the offshore oil industry are subject to admiralty jurisdiction.

Respectfully submitted,

HAROLD K. WATSON
Counsel of Record
CHRISTOPHER DOVE
LOCKE LORD BISSELL
& LIDDELL LLP
600 Travis St., Suite 3400
Houston, TX 77002
(713) 226-1200

MARCUS R. TUCKER
ROYSTON, RAYZOR, VICKERY
& WILLIAMS, LLP
1001 McKinney, Suite 1100
Houston, TX 77002
(713) 224-8380